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6 UNITED STATES DISTRICT COURT  
7 EASTERN DISTRICT OF WASHINGTON  
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10 ATLANTIC CASUALTY INSURANCE  
11 COMPANY, a North Carolina corporation,  
12 Plaintiff,  
13 v.  
14 BRAD BELLINGER, an individual d/b/a  
15 LILAC CITY VAPOR; LILAC CITY  
16 VAPOR, a Washington limited liability  
17 company; MARLENE RUBERTT, an  
18 individual,  
19 Defendant.  
20

2:16-cv-00422-SAB

**ORDER GRANTING  
PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT**

21 Before the Court is Plaintiff's Motion for Summary Judgment, ECF No. 26.  
22 A hearing was held on September 6, 2017 in Yakima, Washington. Plaintiff was  
23 represented by Mary DeYoung. Defendants Brad Bellinger and Lilac City Vapor,  
24 LLC were represented by Benjamin McDonnell and Defendant Marlene Rubertt  
25 by Liz McLafferty. This Order memorializes the Court's oral ruling.

26 **Background**

27 Plaintiff Atlantic Casualty Insurance Company (Atlantic) filed this  
28 Declaratory Judgment Action on December 1, 2016 seeking a declaration that,

1 under an applicable insurance policy, Defendants Brad Bellinger (Bellinger) and  
2 Lilac City Vapor, LLC (LCV) are not entitled to insurance coverage for claims  
3 made by Defendant Marlene Rubertt (Rubertt) in an underlying state court  
4 products liability lawsuit and that it has no duty to defend. On February 6, 2017,  
5 Defendants moved to dismiss the complaint or, alternatively, stay this case  
6 pending resolution of the underlying lawsuit. The Court denied the motion and  
7 Plaintiff filed the present motion for summary judgment on June 2, 2017.

### 8 **Facts**

9 The material facts are not in dispute. On October 13, 2016, Rubertt filed a  
10 lawsuit captioned *Marlene Rubertt v. Lilac City Vapor, LLC et al.* in Spokane  
11 County Superior Court alleging the following: Rubertt purchased an electronic  
12 cigarette and related parts from LCV. On January 30, 2016, Rubertt was home  
13 watching television and brought the electronic cigarette to her mouth to inhale  
14 from the device when the electronic cigarette suddenly exploded in her face. As a  
15 result, Rubertt suffered severe, traumatic injuries to her mouth and face, along  
16 with burns to her neck, chest, face, and the roof of her mouth. Following the  
17 explosion, Rubertt was driven to the emergency room and given an IV and pain  
18 medication. She continued to receive treatment and care for her injuries, including  
19 bone reconstruction in her jaw, a sinus lift, and three surgical extractions of roots  
20 and broken teeth. Pieces of the electronic cigarette plastic were also removed from  
21 her upper lip. She will require additional surgery.

22 On February 16, 2016, attorney Dayle Andersen sent a letter notifying LCV  
23 and Bellinger that the Andersen Law Office had been retained to represent Rubertt  
24 (then going by Ms. Garcia) in her claim for personal injuries against LCV. After  
25 receiving notification, Atlantic, through its agent American Claims Service, Inc.,  
26 sent LCV a letter dated March 29, 2016 in which it denied coverage for Rubertt's  
27 claim. The claim was denied due to applicable insurance policy exclusions.

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1 Rubertt's Complaint stated causes of actions for products liability and  
2 negligence. On October 21, 2016, LCV sent a Demand for Defense Letter to  
3 Atlantic Casualty Insurance Company. Atlantic tendered a defense subject to a  
4 reservation of rights by letter dated November 3, 2016. Rubertt filed a First  
5 Amended Complaint for Damages on December 7, 2016. She again stated causes  
6 of action for products liability and negligence.

### 7 **Legal Standard**

8 Summary judgment is appropriate if the pleadings, discovery, and affidavits  
9 demonstrate there is no genuine issue of material fact and that the moving party is  
10 entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317,  
11 323 (1986) (citing Fed. R. Civ. P. 56(c)). There is no genuine issue for trial unless  
12 there is sufficient evidence favoring the nonmoving party for a jury to return a  
13 verdict in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250  
14 (1986). The moving party has the burden of showing the absence of a genuine  
15 issue of fact for trial. *Celotex*, 477 U.S. at 325.

16 When considering a motion for summary judgment, the Court neither  
17 weighs evidence nor assesses credibility; instead, "[t]he evidence of the non-  
18 movant is to be believed, and all justifiable inferences are to be drawn in his  
19 favor." *Anderson*, 477 U.S. at 255. When relevant facts are not in dispute,  
20 summary judgment as a matter of law is appropriate, *Klamath Water Users*  
21 *Protective Ass'n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir. 1999), but "[i]f  
22 reasonable minds can reach different conclusions, summary judgment is  
23 improper." *Kalmas v. Wagner*, 133 Wn. 2d 210, 215 (1997).

### 24 **Discussion**

25 Interpretation of an insurance policy is a question of law that may be  
26 resolved on summary judgment. *Reliable Credit Ass'n, Inc. v. Progressive Direct*  
27 *Ins. Co.*, 171 Wn. App. 630, 638 (2012). Because insurance policies are contracts,  
28 the rules of contract interpretation apply. *Id.* When interpreting an insurance

1 policy, the Court should consider the contract as a whole and arrive at a “fair,  
2 reasonable, and sensible construction as would be given to the contract by the  
3 average person purchasing insurance.” *Id.* (quoting *Quadrant Corp. v. Am. States*  
4 *Ins. Co.*, 154 Wn. 2d, 165, 171 (2005)) (internal quotation marks omitted). If the  
5 language of the insurance policy is unambiguous, the Court must enforce it as  
6 written. *Id.* (citing *Quadrant Corp.*, 154 Wn. 2d at 171). Exclusionary clauses in  
7 an insurance policy must be strictly construed against the insurer; “[w]here there is  
8 room for two constructions of an exclusionary clause, one favorable to the insured  
9 and one favorable to the insurer, courts must adopt the construction favorable to  
10 the insured.” *Id.* at 638-39 (citing *Murray v. W. Pac. Ins. Co.*, 2 Wn. App. 985,  
11 992 (1970)).

12 Under Washington law, a “duty to defend ‘arises at the time an action is first  
13 brought, and is based on the potential for liability.’” *Woo v. Fireman’s Fund Ins.*  
14 *Co.*, 161 Wn. 2d 43, 52 (2007) (quoting *Truck Ins. Exch. v. VanPort Homes, Inc.*,  
15 147 Wn. 2d 751, 760 (2002)). An insurer has a duty to defend “when a complaint  
16 against the insured, construed liberally, alleges facts which could, if proven,  
17 impose liability within the policy’s coverage.” *Id.* at 52-53 (citing *Truck Ins.*  
18 *Exch.*, 147 Wn. 2d at 760) (internal quotation marks omitted). “An insurer is not  
19 relieved of its duty to defend unless the claim alleged in the complaint is ‘clearly  
20 not covered by the policy.’” *Id.* at 53 (quoting *Truck Ins. Exch.*, 147 Wn.2d at  
21 760)). Thus, the duty to defend must be determined from the complaint. However,  
22 “[t]here are two exceptions to the rule that the duty to defend must be determined  
23 only from the complaint, and both the exceptions favor the insured.” *Truck Ins.*  
24 *Exch.*, 147 Wn.2d at 761. Neither exception is applicable here.

25 Bellinger and LCV were insured under Commercial General Liability  
26 Coverage policy No. M179000250 (the “Insurance Policy”) from August 1, 2015  
27 through August 1, 2016. Coverage A of the Insurance Policy obligates Atlantic to  
28 pay those sums that the insured becomes legally obligated to pay because of

1 “bodily injury” or “property damage” to which the insurance applies. The  
2 insurance applies to bodily injury or property damage caused by an occurrence  
3 that takes place within the coverage territory and during the policy period. It also  
4 states that Atlantic has “the right and duty to defend the insured against any ‘suit’  
5 seeking those damages.” ECF No. 28-3. Atlantic has no duty to defend the insured  
6 if the insurance does not apply to the damage. Coverage C provides that Atlantic  
7 will pay medical expenses for bodily injury caused by an accident because of  
8 “your operations” if the accident takes place within the coverage territory,  
9 expenses are reported within one year of the accident, and the injured person  
10 submits to examination.

11 The Insurance Policy also provides, in conspicuous language, that the  
12 following endorsement changes the policy, “please read it carefully.” ECF No. 28-  
13 3. The Exclusion-Products-Completed Operations Hazard provides that “[t]his  
14 insurance does not apply to ‘bodily injury’ or ‘property damage’ included within  
15 the ‘products-completed operations hazard.’” The products-completed operations  
16 hazard “[i]ncludes all ‘bodily injury’ and ‘property damage’ *occurring away from*  
17 *premises you own or rent and arising out of ‘your product’ or ‘your work.’*” *Id.*  
18 (emphasis added). “Your product” means “[a]ny goods or products, other than real  
19 property, manufactured, sold, handled, distributed or disposed of by: (a) You; (b)  
20 Others trading under your name; or (c) A person or organization whose business  
21 or assets you have acquired.” “Your product” explicitly includes “(1) Warranties  
22 or representations *made at any time* with respect to the fitness, quality, durability,  
23 performance or use of ‘your product’; and (2) The providing of or failure to  
24 provide warnings or instructions.” *Id.* (emphasis added).

25 Rubertt’s First Amended Complaint alleges that Defendant LCV and non-  
26 party Innotel, Inc. (“Innotel”) are the manufacturers, wholesalers, distributors, and  
27 retailers of the electronic cigarette purchased by Rubertt. She states causes of  
28 action for products liability in negligence. Specifically, Rubertt claims that

1 Defendants violated the Washington Product Liability Act, Wash. Rev. Code  
2 § 7.72.010, *et seq.*, because the product was defective, not reasonably safe in its  
3 design, and failed to provide adequate warning and instruction. Rubertt also  
4 alleges that LCV and Innotel were negligent insofar as they breached their duty to  
5 use reasonable care in providing information and warnings to users of the product.

6 The parties do not dispute that Coverage A and Coverage C are potentially  
7 applicable to the underlying action. The sole question for the Court is whether the  
8 Products-Completed Operations Hazard excludes coverage under the policy.

9 Specifically, the Court must determine whether the term “your product”  
10 encompasses warranties, representations, warnings, or lack thereof, made by third  
11 parties. Defendants contend that it does not. Defendants argue that because LCV,  
12 as a product seller, can have the liability of a manufacturer under Washington’s  
13 product liability law, the Products-Completed Operation Hazard is inapplicable  
14 because it does not apply to warranties, representations, or warning made by third  
15 parties, in this case, the manufacturer.

16 Defendants’ argument is unpersuasive. The definition of “your product” is  
17 unambiguous. It includes “(1) Warranties or representations made at any time with  
18 respect to the fitness, quality, durability, performance or use of ‘your product’; and  
19 (2) The providing of or failure to provide warnings or instructions.” ECF No. 28-  
20 3. This provision is broad; it is not limited to warranties or representations made  
21 by third parties. It is of no consequence that LCV might have the liability of a  
22 manufacturer. The policy excludes coverage for bodily injuries arising from  
23 products manufactured, sold, handled, distributed or disposed of by the insured,  
24 including those sustained as a result of any warranties, representations, and  
25 warnings that were made or not. Rubertt’s First Amended Complaint  
26 unequivocally seeks redress for bodily injuries she sustained when LCV’s product  
27 exploded in her face. Her claims for bodily injury are plainly excluded under the  
28 policy, including her warranty and failure to warn causes of action.

1 Defendants further argue that Rubertt's allegations of negligence are not  
2 excluded by the Products-Completed Operation Hazard. This argument also fails.  
3 The Insurance Policy excludes coverage for all bodily injuries occurring away  
4 from the insured's premises as a result of the insured's product. The exclusion  
5 does not limit the theories of liability to which it applies, rather, the focus is on the  
6 injury sustained. Because the Insurance Policy unambiguously excludes coverage  
7 for Rubertt's claims, Atlantic has no duty to defend against the underlying lawsuit.  
8 Atlantic's motion is granted.

9 Accordingly, **IT IS HEREBY ORDERED:**

10 1. Plaintiff's Motion for Summary Judgment, ECF No. 26, is **GRANTED**.

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1           2. A declaratory judgment shall be entered, in favor of Plaintiff and  
2 against each Defendant, that:

3           (1) policy no. M179000250 provides no coverage to defendants Lilac  
4 City Vapor, LLC or Brad Bellinger dba Lilac City Vapor for the  
5 claims made by defendant Marlene Rubertt in the liability lawsuit  
6 captioned *Marlene Rubertt v. Lilac City Vapor, LLC et al.*, Spokane  
7 County Superior Court no. 16-2-03995-7;

8           (2) Atlantic has no duty to defend Lilac City Vapor, LLC or Brad  
9 Bellinger dba Lilac City Vapor policy no. M179000250 against the  
10 claims made by Marlene Rubertt in the liability lawsuit;

11           (3) Atlantic may withdraw from the defense it is currently providing  
12 to Lilac City Vapor, LLC for the claims made against it by defendant  
13 Marlene Rubertt in the liability lawsuit;

14           (4) Atlantic has no duty to indemnify Lilac City Vapor, LLC or Brad  
15 Bellinger dba Lilac City Vapor in connection with any settlement  
16 with or judgment in favor of defendant Marlene Rubertt in the  
17 liability lawsuit.

18           **IT IS SO ORDERED.** The District Court Executive is hereby  
19 directed to enter Judgment, file this Order, provide copies to counsel,  
20 and **close** this file.

21           **DATED** this 8th day of September 2017.



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A handwritten signature in blue ink, reading "Stanley A. Bastian", is written over a horizontal line.

27           Stanley A. Bastian  
28           United States District Judge